No. 22492.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc.

ROLLIN E. WOODBURY,
RICHARD T. DRUKKER,
HUGH B. ROTCHFORD,
411 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 22492.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing
and
Suggestion of Appropriateness of Rehearing in Banc.

Appellant files herewith its petition for rehearing on the grounds that this Honorable Court has overlooked and misapprehended points of law and fact.

Appellant suggests a rehearing *in banc* because the proceeding involves a question of exceptional importance in that a Constitutional right of the highest order has been denied to Appellant by the Summary Judgment of the District Court and because this denial has been affirmed by the Court of Appeals without, it is respectfully submitted, real consideration of the basic Constitutional points.

Specific Grounds of Petition for Rehearing.

1. In its opinion, the Court said, "It was stipulated in the District Court that the issue (unconstitutional discrimination) was an appropriate one for summary judgment." This is a misapprehension of the record and is simply not the fact.

2. The Court has affirmed a summary judgment, placing on Appellant the burden of overcoming the presumption of Constitutionality by affidavit on a Motion for Summary Judgment brought by Plaintiff. This is expressly contrary to law.

3. The Court has misapprehended the law with reference to the equal protection clause, as incorporated in the due process clause and has, in substance, ruled that the issue of discrimination is irrelevant when the party discriminated against is a "profit" corporation and the party in whose favor the discrimination operates is a "non-profit" Governmental proprietary entity.

4. The Court has failed to deal at all with the position taken by Appellant in its Argument that the actions of the Forest Service in treating privately-owned and publicly-owned utilities differently is contrary to its sole statutory authorization to make regulations for the use of rights of way in the national forest for electrical

plants and, in so doing, has misapprehended the import of the only case cited in its opinion.

5. The opinion has required Appellant to overcome the presumption of Constitutionality by affidavit in a summary judgment proceeding, in the face of a specific holding by the District Court that *any* evidence offered by Appellant was immaterial and irrelevant. Therefore, all the affidavits in the world would have been useless.

The Court Inaccurately Stated That the Parties Had Stipulated That the Constitutional Issue Was Appropriate for Summary Judgment.

On Page 3 of its opinion, this Court said, "It was stipulated in the District Court that the issue was an appropriate one for summary judgment." The issue referred to was the claim of unconstitutional discrimination. *There was no such stipulation.* The Reporter's Transcript clearly so indicates. Beginning on Page 3, the Court asked the parties if they did not agree that the case was ripe for summary judgment. The Court said:

> "It gets down to the construction of this contract and the interpretation of it; and it is really a question of law, isn't it? And I take it that one might almost say that if a motion for summary judgment is denied on the ground that the contract should not be construed as sought, that a reciprocal motion for summary judgment would be forthcoming."

Counsel for Appellant said:

> "Certainly, your Honor, *if that was the procedure that was appropriate* . . . I am naturally convinced of my own position, that the document (the permit granting the right of way) does not support the Government's position either upon motion for summary judgment or at any other time."

Counsel for Appellant did agree that the contract was one which had to be judged by its four corners, and

that the decision as to the meaning of the contract was an issue of law. [R. Tr. p. 4]*.

Appellant contended, and the Court recognized, that the Constitutional issue was the issue upon which Appellant sought to introduce factual evidence. The Court said:

> "The Constitutional issue is really the only one upon which you would seek to introduce some factual evidence." [R. Tr. p. 5].

Appellant then detailed, to some considerable extent, the nature of that evidence [R. Tr. p. 5].

The Court then said:

> "If the Court would exclude the evidence on the grounds of incompetency and immateriality, then there is no need to have an unnecessary trial for the purpose of permitting the evidence to be offered." [R. Tr. p. 6].

On this assumption only did counsel agree that a trial would be unnecessary [R. Tr. p. 6].

The only stipulations that counsel or Appellant entered into are the written stipulations in the transcript of the record; namely:

> (a) The stipulation regarding the facts and the issues filed August 11, 1967 [T. 92].
>
> (b) The second stipulating regarding facts and issued filed September 13, 1967 [T. 172].
>
> (c) Several stipulations for continuance [T. 80, 82, 90].

There were no other stipulations, written or oral. At no time did Appellant stipulate that the Constitutional issue, or any issue, was appropriate for summary judgment.

---

*Hereafter the Reporter's Transcript is cited "R. Tr." and the transcript of record [Clerk's Transcipt] as "T."

The Court Has Placed the Burden of Overcoming the Presumption of Constitutionality on the Party Resisting a Motion for Summary Judgment, Contrary to Law.

The Court of Appeals has placed the burden of overcoming the presumption of Constitutionality upon Appellant on a motion for summary judgment. Of course, all actions are presumed Constitutional and a party who asserts their unconstitutionality has the burden of proof, but *not* on a motion for summary judgment. All intendments are against the moving party on such motions. This includes Constitutional issues. On trial, Appellant would have had the burden of sustaining its contention of unconstitutional Forest Service Action. But on summary judgment, every position taken by the movant is presumably wrong including its position on Constitutionality. In this short petition, it is impossible to list the hundreds of cases so holding, but we suggest a few principles and authorities:

(a) On motion for summary judgment, all doubts are resolved against the movant.

Cases Collected in 28 U.S.C.A. (Rules 52-58), Pages 308, *et seq.*

(b) On motion for summary judgment, every intendment and presumption is to be taken contrary to the position of the movant. Summary judgment is never a substitute for trial on any factual issue.

Griffeth v. Utah Power & Light Co. (9th Cir.), 226 F. 2d 661;

Cases Collected in 28 U.S.C.A. (Rules 52-58), Pages 311-336.

(c) A motion for summary judgment must be granted only with a great caution and reluctance, and only in the clearest of cases even if the ad-

verse party's position is surmised to be futile, unless it is sham.

Atlas Sewing Machine Co., etc. v. National Assoc., 260 F. 2d 803;

United States Steel Co. v. Vasco Metals Corp., 394 F. 2d 1009;

Union Carbide Corp. v. Hicks, 162 F. Supp. 612;

Union Transfer Co. v. Riss, 218 F. 2d 553.

Here Appellant suggested the facts, by affidavit, argument, judicial notice and admission, that it would establish at trial the nature of the unconstitutional discrimination:

(a) Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment [T. 128].

(b) Defendant's Memorandum of Contentions of Fact and Law [T. 161].

(c) Defendant's Request for Change and Additional Findings of Fact and Law [T. 175].

(d) Affidavits [T. 118 and 120].

(e) Statement of Opposition to Motion for Summary Judgment and Statement of Genuine Issues [T. 156].

(f) Argument in open court [R. Tr. 5, 6, 7, 9, 10-12, 14].

In addition, there was before the Court, of course, all matters which it judicially noticed.

Cases Collected in 28 U.S.C.A., Rule 56, Note 89.

The facts so judicially noticed were extensively pointed out to this Honorable Court. In summary, on a motion for summary judgment where the basic issue was the unconstitutionality of the Government's action, this Court has placed the burden of proof on the party resisting the summary judgment. The law in the premises is directly contrary.

The Court Has Precluded Appellant Because It Is a Corporation Organized for Profit From Making Its Contention That It Has Been Unconstitutionally Discriminated Against.

In essence, the entire decision of the Court of Appeals is that discrimination, as a Constitutional claim, is not available to appellant because it is a profit-seeking corporation, and the parties in whose favor the discrimination operates are so-called municipal proprietary corporations. Certainly this cannot be the law. Governmental corporations may today enter into almost any business on a proprietary basis. The United States operates clothing and gun factories. The City of Los Angeles operates a power and light system. *Springfield* operated a utility; Long Beach operates an entertainment center; Los Angeles County, a music center. If the Court is correct and equal protection is denied to the private competitors of such public bodies, which operate exactly the same business in a proprietary capacity, by governmentality granted privileges which are denied to their private competitors, the result could completely eliminate private enterprise.

Surely, upon reconsideration, it will be manifest to the Court that the problem of unjust discrimination requires a more discerning analysis of economic reality than sole reliance upon whether the semantic term "profit-making" is applied to the party seeking Constitutional protection. Nowhere in the equal protection clause, nor in the due process clause, can we find any hint of an exception reading, "Notwithstanding the language of the foregoing paragraph of this Constitution, the same is not applicable to profit-making corporations."

The *lone* judicial authority cited by the Court is *Springfield Gas Co. v. Springfield,* 257 U.S. 66. This was a decision in 1921 written by Mr.

Justice Holmes. The fact situation was this: Illinois law granted rate-making powers to the State Public Utilities Commission for privately-owned public utilities, and granted the same authority to city councils in the case of city-owned utilities. Springfield, chartered a municipal utility in its proprietary function, and then in its governmental function fixed its rates. The Springfield Gas & Electric Co., whose rates were regulated by the State Public Utilities Commission, contended this was an unconstitutional discrimination. The Court, speaking through Mr. Justice Holmes, held it was not. That is all the case held. The limited meaning of *Springfield* has been made clear by subsequent decisions. It has been cited by four Supreme Court decisions:

National Life v. U.S., 277 U.S. 535;
Public Service Commission v. Great Northern Utilities, 289 U.S. 134;
Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619;
New York v. U.S., 326 U.S. 582.

All of these cases treat *Springfield* as essentially a tax case. This is most clearly made evident in the dissent in *National Life v. U.S.*, written by Mr. Justice Brandeis and concurred in by Mr. Justice Holmes himself. The concept that making a profit deprives one from equal protection is not at all further mentioned by the Supreme Court of the United States in its consideration of the *Springfield* case. The tax meaning of the case is constantly re-emphasized. For example, in *Puget Sound supra,* at page 625 the court stated: "The municipality which is enabled to function only because it is a tax gatherer may . . . conduct a business in the interest of the public welfare, and *its gains* if any must be used for public ends," (Emphasis added), thus recognizing the "profit" potential of and the use thereof, by such municipal corporations.

Moreover, further light is cast upon *Springfield* by the Court of Appeals in *City of Seymour v. Texas Electric Service Company,* 66 F. 2d 814 at 817. The Court noted there that municipally-owned utilities may have their rates fixed at a lower figure than their private competition is required to charge. The Court then refers to the "profit" paragraph of the *Springfield* decision, and says, "The reason for this language is not far to seek." The Circuit said, "When the City regulates the rate of the City-owned public utility, it acts not as a City in its proprietary capacity, but it acts as the State as regulator." In essence, the Circut points out that what Justice Holmes was saying was that, while there was rate regulation in both cases, the same body did not have to do the rate making, and that it would be presumed that the City, acting in its governmental capacity, was establishing fair and reasonable rates, just as the State Public Utilities Commission was establishing fair and reasonable rates for the privately-owned utility. This bifurcation of rate-making authority was held not unconstitutional.

The Court Has Completely Overlooked the Contention That the Forest Service Exceeded Its Sole Statutory Authority.

The Court recognizes that it is conceded that the Forest Service seeks to place absolute liability only on *privately-owned* utilities. In argument, Appellant pointed out that Volume 16 of the United States Code, Section 522, required that permits to use the national forest for electrical purposes were to be issued "under *general* regulations to be fixed by him to permit use of the rights of way through the national forest for electrical plants by *any* citizen, association or corporation of the United States" (Emphasis added). The statutory authority is thus limited to general regulations applicable

to all alike. By issuing discriminatory regulations, the Forest Service has exceeded its statutory authority. Its purported justification for such discrimination is specious and violates Art. VI of the Constitution.

The Opinion Has Required Appellant to Rebut the Presumption of Constitutionality by Affidavit Despite the Ruling of the District Court That All Evidence Would Be Immaterial and Irrelevant.

On motion for summary judgment, affidavits of the resisting party may be filed but are not required. Rules of Procedure, Rule 56(c).

All other documents, arguments and materials judicially noticed are relevant and to be considered.

Hiern v. St. Paul Mercury Insurance Co., 262 F. 2d 526;

Inglett & Co. v. Everglades Fertilizer Co., 255 F. 2d 342;

Wittlin v. Giacalone, 154 F. 2d 20, where the Court said, among other things, that the District Court should be critical of papers presented by the movant, but not of the opponent's papers.

These rules, however, would be relevant to every case, but in our case there is a special matter. The Honorable District Judge made this abundantly clear. He said:

> "This is not a Constitutional argument of merit and . . . *offered evidence contained in the affidavits would be irrelevant and immaterial and the fact that it exists does not militate against the granting of the summary judgment motion."* [R. Tr. pp. 23 and 24]. (Emphasis added).

It is both good law and good sense that no one need do a useless thing. Certainly, in the face of this record this Court cannot justly say, as it did, "The burden of overcoming the presumption of Constitutionality was with Appellant. . . . No showing was made by Appellant in its affidavits submitted to the District Court as to what exploration of the subject might produce" and that "we come too late to dig deeper into the nature of the discrimination." (Opinion p. 3). This Honorable Court, we respectifully submit, in affirming the District Court, has said, on the one hand, "You should have proved your case below by affidavit" and on the other hand has said that the District Court was right in saying that the affidavits and further evidence were wholly immaterial and irrelevant. Has the Constitutional door not been improperly closed to us by the combination of the two positions?

Conclusion.

The case is of great importance. It is a case of first impression, on the Government's own admission involving a contention having widespread application. An exceptional rule of law, absolute liability, has been made binding on Appellant, without a day in court to challenge the Constitutionality of such an unusual application with its bizarre results.

We earnestly pray a rehearing and suggest the importance of the decision requires a rehearing *in banc*.

Respectfully submitted,

ROLLIN E. WOODBURY,
RICHARD T. DRUKKER, and
HUGH B. ROTCHFORD,
Attorneys for Appellant.

Certificate.

We hereby certify that in our judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

ROLLIN E. WOODBURY

RICHARD T. DRUKKER and
HUGH B. ROTCHFORD

By ROLLIN E. WOODBURY